

SOUTH AFRICA / JUDGMENT

## Wessels v Department of Water Affairs and Forestry (WT 13/03/2006) [2009] ZAWT 2 (8 January 2009) [2009] ZAWT 2

COURT

Water Tribunal

BEFORE

L. J. Lekale, W. Singo, H. Thompson, A. S.  
Makhanya, A. S. Hadebe

CASE / FILE NUMBER

WT 13/03/2006

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IN THE WATER TRIBUNAL

HELD AT PRETORIA

REF: WT 13/03/2006

In the appeal between

G M WESSELS APPELLANT

And

THE DEPARTMENT OF WATER AFFAIRS AND FORESTRY RESPONDENT

APPEAL DECISION

DATE: 08 JANUARY 2009·

APPEARANCES:

Coram

Mr L. J. Lekale (Chairperson)

Dr W. Singo (Deputy Chairperson)

Mr H. Thompson (Member)

Mr A. S. Makhanya (Member)

Mr A. S. Hadebe (Member)

For the Appellant Mr B. C. van Rooyen

For the Respondent Mr L. Mtshotshisa

## 1.DETAILS OF HEARING AND REPRESENTATION:

1.1. This is a decision in the appeal hearing held on the 28th November 2008 at Pretoria;

1.2. The appellant was represented by Mr B. C. van Rooyen from the firm Grimbeek, Van Rooyen & Partners Inc. in Kroonstad ;

1.3. The Respondent, on its part, was represented by Mr L. Mtshotshisa from the legal department of the Respondent and was assisted by Mr F. van der Walt from the Free State Regional office of the Respondent .

## 2. ISSUES TO BE DECIDED:

2.1. The question raised by the Water Tribunal of own accord was whether or not the Tribunal had the requisite jurisdiction to give a ruling on the relief as sought by the Appellant, and if so, whether the Tribunal should make such a ruling;

2.2. In the event that the Tribunal has no jurisdiction to make a decision on the relief as sought by the Appellant, the question is what suitable ruling may the Tribunal make in the matter, and whether the Tribunal should make such a decision.

## 3. BACKGROUND TO THE ISSUE:

3.1. The Appellant constructed a dam in the Otterspruit Marsh on Portion 8 of Rietgat 73 in the Kroonstad area. A number of third parties objected to this.

3.2. The dam results in the following water uses as contemplated in section 21(b), (c) and (i) of the National Water Act of 1998 (NWA): Storing water; impeding the flow of water in a watercourse; and altering the bed, banks, course or characteristics of a watercourse . The Appellant has no authorisations in terms of the NWA for these water uses.

3.3. Due to uncertainties on how to deal with this matter, the Respondent afforded the Appellant the opportunity to apply for the necessary licence to store water in the dam, which was done.

3.4. The Respondent has not taken any decision regarding this application, but the Free State Regional Office of the Respondent did not recommend the application when it was sent through to the National Offices for a decision. The reason being that the area concerned is water stressed.

3.5. As the persons downstream of the dam are pleading for action from the Respondent to rectify the matter, the Respondent through its Regional Director of the Free State Regional Office issued on 13 February 2006 a directive to the Appellant directing the Appellant among others "to stop all unlawful water uses and to take action to prevent the possible forming of erosion and deterioration of the water quality. A Rehabilitation and Environmental Management plan for the removal of the dams must be submitted for approval by this Department within 30 calendar days after receipt of this directive."

3.6. The Appellant appealed against this directive to the Water Tribunal and the Tribunal made the following ruling with reference number WT 13/03/2006 towards the end of 2007:

*"31. I therefore rule that the appeal should succeed. The Appellant is entitled to a determination of his application. I am mindful that ... [the] application is not subject of this appeal. I have held, however, that this appeal and the licence application are*

*intrinsically linked. Otherwise, the Appellant may well be prejudiced by being obliged to destroy the dam and only for his licence*

*application to be approved after such destruction. The following order is made:*

31.1 The appeal is upheld;

31.2 The directive of the Respondent is suspended pending the determination by the Respondent of the application by the Applicant regarding the construction of the dam and the use of water in the dam at Rietgat 73 Portion 8, Kroonstad;

31.3 The directive is suspended for a period of 6 months;

31.4 The appellant may approach the Tribunal for a suitable ruling in the event that the application by the appellant has not been determined within a period of six months from the date of this ruling."

3.7. As more than six months have lapsed since the ruling and the Respondent has not made any determination on the licence application

of the Appellant, the Appellant now approaches the Water Tribunal for a suitable ruling as contemplated in item 31.4 of the ruling.

#### 4. SURVEY OF EVIDENCE AND ARGUMENTS:

##### 4.1. Evidence:

No oral evidence was adduced. The Appellant and Respondent made oral submissions through their respective representatives.

##### 4.2. Documents submitted:

The bundle from the Registrar of the Water Tribunal.

##### 4.3. Arguments:

Mr van Rooyen on behalf of the Appellant submitted that a suitable ruling would be for the Water Tribunal to direct the Department of Water Affairs and Forestry to get finality on the licence application. His client is prejudiced due to the long time it is taking to finalise the matter and it also creates uncertainties for the labourers on the property. Mr van Rooyen argued that section 148(i)(f) and (j) of the NWA gives the Tribunal the necessary authority to make such an order.

Mr Mtshotshisa stated that the Department of Water Affairs and Forestry received the application for the licence but no decision regarding the application has been made. Therefore the dam results in unauthorised water uses and effect should be given to the directive to rectify this by removing the dam.

Mr Mtshotshisa also stated that the Respondent had various problems with the previous Water Tribunal ruling. He argued that the licence application and the directive were not intrinsically linked. Therefore, if a water use is not authorised, it must stop and effect must be given to any directive issued to effect that. Further he also argued that the Water Tribunal had no authority to suspend the directive as was done. Section 148(2)(a) of the NWA states that "An appeal ... does not suspend a directive given ...".

Mr van Rooyen said that if the Respondent had problems with the previous ruling of the Tribunal they should have appealed on that in terms of section 149 of the NWA. Mr Mtshotshisa responded that the Respondent decided not to do that but to wait for the outcome of this ruling to determine what steps are to be taken.

Mr van Rooyen and Mr Mtshotshisa also have different viewpoints on the application of the previous ruling of the Tribunal, if it is assumed that the Tribunal had the jurisdiction to make such a decision. Mr van Rooyen argued that the directive is suspended until the licence application has been dealt with, and if the licence application is approved, the directive falls away automatically. Mr Mtshotshisa, on the other hand, argues that the directive is now operative and should be given effect to as the 6 months period of suspension has lapsed.

On a question from the Tribunal that in the case that the Tribunal has no jurisdiction to give a ruling on the relief sought by the Appellant, or if it has, but does not grant the relief, what other suitable ruling could be given by the Tribunal, Mr van Rooyen said that his client is prepared to make the necessary changes to the dam as directed.

## 5. ANALYSIS OF EVIDENCE AND ARGUMENTS:

The matter before the Water Tribunal is due to a ruling previously made by the Tribunal on an appeal against a directive issued by the Respondent. According to this ruling "The appellant may approach the Tribunal for a suitable ruling in the event that the application by the appellant has not been determined within a period of six months from the date of this ruling".

The Appellant must show that the Tribunal has the necessary jurisdiction to make a decision as requested, namely to direct the Department of Water Affairs and Forestry to get finality on the licence application.

As the Water Tribunal is a creation of the Legislature, it has only the powers, functions and duties assigned to it by the Legislature. This means the relevant provisions of the NWA should be studied to determine whether the Water Tribunal has any authority to consider

the request. There is no indication in the NWA that it does and the Appellant has also not show that the Tribunal has the necessary

jurisdiction.

The legal position is that the storing of water in the dam is unauthorised and should stop. This is what the directive concerned

intended to achieve. However, as indicated by this Tribunal in the previous ruling, the Appellant would be prejudiced by that if the licence application is approved after the dam has been destroyed.

The Department has created this dilemma as the Department afforded the Appellant the opportunity to apply for a licence for the unlawful water use. Therefore, only once this licence application has been dealt with, could finality on the whole matter be reached. Although the licence application is distinguishable from the directive, they could not be separated due to this opportunity afforded by the Department.

Further, the Tribunal also granted the opportunity to the Appellant to approach the Tribunal for a suitable ruling, which he did.

Therefore the Tribunal should make a suitable ruling to address this issue within the jurisdiction of the Tribunal.

It is not for this Tribunal to make any decision or recommendation on the application for the licence to store water. Therefore any decision or ruling made by this Tribunal should not be seen as that the Tribunal supports or does not support the licence application. It has no authority regarding that.

## 6. DECISION:

6.1. The Water Tribunal has no jurisdiction to give a ruling as sought by the Applicant "to direct the Department of Water Affairs and Forestry to get finality on the licence application".

6.2. The directive issued by the Regional Director of the Free State Regional office of the Department of Water Affairs and Forestry dated 13 February 2006 is hereby amended by substituting the portion of the directive reading "to take action to prevent the possible forming of erosion and deterioration of the water quality. A Rehabilitation and Environmental Management plan for the removal of the dams must be submitted for approval by this Department within 30 calendar days after receipt of this directive" with the following:

6.2.1. The Appellant must make the necessary changes to the dam wall and/or related water infrastructure before 31 April 2009 to ensure that no water could be stored in the dam concerned, which may include but is not limited to the breaching of a portion of the dam wall at its lowest point, and such changes must be done under the supervision of a person registered as a professional engineer in terms of the Engineering Profession Act 46 of 2000 to ensure that any water released from the dam during the changes would not cause any floods downstream of the dam.

6.2.2. The Appellant must submit a certificate signed by a person registered as a professional engineer in terms of the Engineering Profession Act 46 of 2000 before 15 May 2009 to the Regional Director of the Free State Regional Office of the Department of Water Affairs, certifying that no water could be stored in the dam due to the changes, that no soil erosion or impact on the quality of the water in the water resources would occur due to the changes and that there would be no loss of life or economic loss due to floods as result of the changes.

6.2.3. If a licence is issued to store water, the Appellant must give effect to the conditions of the licence and make the necessary changes to the dam and/or water-related infrastructure in line therewith, and the directive will fall away automatically.

6.2.4. If a licence is refused and the Appellant does not appeal against the decision of the Department regarding that, the Appellant must give effect to the directive issued by the Department dated 13 February 2006, as if it was not amended by this ruling, and any period mentioned in the directive will start to run from the date of receipt of the decision concerned by the Appellant.

6.2.5. If a licence is refused and the Appellant appeals against the decision of the Department but the appeal is not successful, the Appellant must give effect to the directive issued by the Department dated 13 February 2006, as if it was not amended by this ruling, and any period mentioned in the directive will start to run from the date of receipt the ruling of the Tribunal by the Appellant.

6.2.6. If a licence is refused and the Appellant appeals against the decision of the Department and the appeal is successful, the

Appellant would have to give effect to the conditions of the licence and make the necessary changes to the dam and/or water-related

infrastructure in line therewith, and then the directive will fall away automatically.

6.3. The file on the appeal to the directive issued by the Regional Director of the Free State Regional Office of the Department of Water Affairs dated 13 February 2006 is hereby closed.

H. Thompson

I agree.

L. J. Lekale

Dr. W. Singo

A.S. Makhanya

A.S.Hadebe

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